Chan Kok Choon JP v MBf Finance Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO C–02–173 OF 1996
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
25 SEPTEMBER 2000

Civil Procedure *— Costs — Taxation — Review of decision of registrar — Whether judge misdirected himself by treating review as appeal*

The appellant was awarded costs against the respondent and upon taxation, the registrar allowed a sum of RM14,000 as the getting-up fee. The respondent application for review before the registrar was dismissed. The respondent then applied for a further review before a judge in chambers and the amount was reduced to RM2,000. The appellant appealed. The issue was whether the learned judge misdirected himself by treating the review as an appeal and in so doing appraised the review by way of a rehearing and substituted his own discretion with that of the taxing master.

Held, allowing the appeal and restoring the order of the registrar:
The learned judge had committed a grave error when he treated the review as an appeal. For the learned judge to interfere, there must be some error of principle or other material error. The court found no such error. The learned registrar gave his written grounds for reducing the getting-up fee to RM14,000 and the court found that he had applied the correct principles in arriving at that figure. The learned judge, however, made no reference at all to these principles (see pp 7H–8A); *Diversey (Far East) Pte Ltd v Chester Chai Chung Ching & Ors* [1993] 2 SCR 241 followed; *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* distinguished.

[Bahasa Malaysia summary

Pihak perayu diberi kos terhadap responden dan semasa penetapan kos, pendaftar menetapkan jumlah RM14,000 sebagai kos penyediaan guaman. Permohonan kajian semula responden di hadapan pendaftar telah ditolak dan pihak responden kemudiannya memohon untuk kajian semula selanjutnya di hadapan hakim dalam kamar. Jumlah kos tersebut dikurangkan kepada RM2,000. Pihak perayu merayu. Isu kes adalah sama ada hakim yang arif telah menyalah arahkan dirinya dengan menganggap kajian semula tersebut sebagai rayuan dan dengan itu, telah menilai rayuan tersebut dengan pembicaraan semula dan telah menggantikan budi bicaranya dengan budi bicara pendaftar.

Diputuskan, membenarkan rayuan dan menempatkan semula perintah pendaftar:
Hakim yang arif telah melakukan kesilapan yang serius dengan menganggap kes untuk kajian semula sebagai kes rayuan. Hakim yang

arif hanya dibenarkan mencelah jika berlaku kesilapan prinsip atau lain-lain kesilapan yang material. Dalam kes ini, mahkamah tidak mendapati sebarang kesilapan. Pendaftar telah manyampaikan alasan pengurangan kos penyediaan guaman kepada RM14,000, dan mahkamah memutuskan bahawa pendaftar telah menggunakan prinsip-prinsip yang betul dalam mendapatkan jumlah tersebut. Akan tetapi, hakim yang arif tidak merujuk kepada prinsip-prinsip yang dikatakan itu (lihat ms 7H–8A); *Diversey (Far East) Pte Ltd v Chester Chai Chung Ching & Ors* [1993] 2 SCR 241 diikut; *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* dibeza.]

Notes

For cases on taxation generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1405–1455.

Cases referred to

Diversey (Far East) Pte Ltd v Chester Chai Chung Ching & Ors [1993] 2 SCR 241 (folld)

JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 1 MLJ 47 (distd)

Lloyds Bank plc v Ang Cheng Ho Quarry & Ors [1993] 1 MLJ 127 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 59 r 36(5), Appendix I Part X Singapore Rules of the Supreme Court 1970 O 59 r 36(5)

Appeal from: Civil Suit No 23–9 of 1998 (High Court, Temerloh)

Bastian P Vendargon (A M Sebastian with him*) (Anthony M Sebastian & Co)* for the appellant.

Francis Tan (Rosni, Francis Tan & Ho) for the respondent.

Shaik Daud JCA. : This appeal is on the issue of taxation of costs and the principles involved in the review of costs by a judge.

The respondent (the plaintiff in the court below) had sued the appellant (the defendant). The chronology of events shows that the writ was served on the appellant on 29 August 1988. The appellant entered appearance on 3 September 1988. The appellant then filed his statement of defence on 9 November 1988. Then on 30 November 1988, the respondent filed an application for summary judgment under O 14 of the Rules of the High Court, 1980. This was followed by an exchange of affidavits. Before the O 14 application was heard, the respondent filed an application and obtained an order to discontinue the proceedings, but nevertheless costs were awarded to the appellant. It is common ground that although the O 14 hearing did not take place, the appellant is entitled to a 'getting up' fee, but the issue is its quantum. The appellant then taxed his bill of costs before the

taxing master, ie the registrar. The learned registrar allowed a sum of RM14,000 as the getting up fee although the appellant had asked for RM20,000. The appellant was satisfied with the amount allowed but the respondent applied for a review before the taxing master who dismissed and confirmed the amount of RM14,000 as the getting up fee. The respondent then applied for a further review before a judge in chambers. The learned judge reduced the amount to RM2,000.

It is the submission of learned counsel for the appellant that the learned judge misdirected himself by treating the review as an appeal and in so doing appraised the review by way of a rehearing and substituted his own discretion with that of the taxing master.

Learned Counsel for the appellant cited the decision in *Diversey (Far East) Pte Ltd v Chester Chai Chung Ching & five Ors* [1993] 2 SCR 241. That case is also a case of review of costs. It was submitted that the review by a judge operates as a rehearing and the judge is entitled to exercise his discretion in substituting the decision of the registrar in respect of the amount awarded. The Singapore Court of Appeal in setting aside the judicial commissioner's reduction of the taxed costs and restoring the award of the registrar had this to say when interpreting the provisions of O 59 r 36(5) of the Singapore Rules of the Supreme Court 1970:

> The phrase 'as the circumstances require' confers on a judge a discretion. This discretion, however, is not unfettered and must be judicially exercised. The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error. The dicta of Aitken J in *Re Kana Moona Syed Abu Bakar* deceased to the effect that a judge would be justified in interfering where the registrar's decision was an affront to reason and common sense is, in our opinion, too harsh a standard to apply .What is required is a broad overview of the matter by the judge and If be justified in interfering with the decision below. To suggest, as counsel for the respondents did, that the hearing before the judge is are hearing would not be in keeping with the wording of r 36 which speaks of review, not of rehearing nor, for that matter, of appeal.

Although this is a decision of the Singapore Court of Appeal, it is relevant and justified for us to consider and adopt as O 59 r 36(5) of the Singapore Rules of the Supreme Court 1970 is in pari materia with our O 59 r 36(5) which covers a review of the registrar's certificate by a judge.

In *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127, Chong Siew Fai J (as he was then) held that generally speaking the discretion of the taxing officer on quantum will not be interfered with.

In the present appeal we are of the view that the learned judge committed this grave error when he treated the review as an appeal. A perusal of his judgment bears testimony to that. In a number of places in his judgment the learned judge referred to the review before him as an appeal and he ended by holding that he allowed 'the appeal with costs'. For the learned judge to interfere there must be some error of principle or some other material error. We can find no such errors in this appeal. The learned judge, therefore, should not have disturbed the finding of the registrar. The

learned registrar gave his written grounds for reducing the getting up fee to RM14,000 and on going through the grounds, we find that he had applied the correct principles in arriving at that figure. The learned judge however, made no reference at all to these principles. The principles adopted by the registrar are spelt out in Appendix I Part X of O 59 and therefore, there is no need to look elsewhere. We are of the view that the learned judge fell into error when he relied on the decision in *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 1 MLJ 47 in deference to the guidelines provided by O 59. That decision ought not to be applied because that was a decision based on a successful O 14 matter, whereas in the present appeal the costs were ordered for the discontinuance of the whole proceeding. He committed yet another error when he treated this matter as a concluded O 14 application. In the light of these errors we allow the appeal with costs here and below. We set aside the learned judge's decision and restore the order of the registrar. We also order the deposit to be refunded to the appellant.

Appeal allowed and order of the registrar restored.

Reported by Chew Phye Ken